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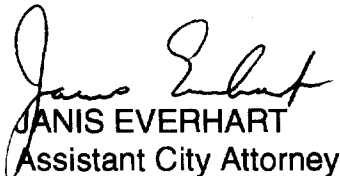
Mr. William F. Caton  
Office of the Secretary  
Federal Communications Commission  
Washington, D.C. 20554

Re: In the Matter of 95-59 Preemption of Local Zoning Regulation of Satellite Earth Stations, IB Docket No. DA 91-577; 45-DSS-MS-93

Dear Mr. Caton:

Enclosed herewith please find an original and ten copies of City of Dallas' Reply Comments to the Notice of Proposed Rulemaking in connection with the above-referenced matter. Please file stamp one copy and return it to me in the self-addressed stamped envelope also enclosed. Should you have any questions, I may be reached at (214) 670-3481.

Very truly yours,

  
JANIS EVERHART  
Assistant City Attorney

Enclosure

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C.

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In the Matter of

) IB Docket No. 95-59

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)

Preemption of Local Zoning Regulation  
of Satellite Earth Stations

) DA 91-577

) 45-DSS-MS-93

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**REPLY COMMENTS OF THE CITIES OF DALLAS, TEXAS; DENTON,  
TEXAS; HILLSBORO, TEXAS; PLANO, TEXAS; FARMERS BRANCH,  
TEXAS; WACO, TEXAS; RICHARDSON, TEXAS; IRVING, TEXAS;  
AND CARROLLTON, TEXAS; THE CITY AND COUNTY OF SAN  
FRANCISCO; THE NATIONAL LEAGUE OF CITIES; THE NATIONAL  
ASSOCIATION OF COUNTIES; AND THE UNITED STATES  
CONFERENCE OF MAYORS**

The cities of: Dallas, Texas; Denton, Texas; Hillsboro, Texas; Plano, Texas; Farmers Branch, Texas; Waco, Texas; Richardson, Texas; Irving, Texas; and Carrollton, Texas; the City and County of San Francisco; and the National League of Cities; the National Association of Counties; and the United States Conference of Mayors; (hereafter collectively referred to as "the Local Communities") submit these reply comments in the above-captioned proceeding.

**INTRODUCTION**

The Federal Communications Commission ("the Commission") has requested and received comments on its proposed rulemaking regarding modification of the rule preempting local regulation of satellite earth stations.<sup>1</sup> In its Notice of Proposed Rulemaking In the Matter of Preemption of Local Zoning

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<sup>1</sup> 47 C.F.R. § 25.104.

Regulation of Satellite Earth Stations, IB Docket No. 95-59 (released May 15, 1995) ("NPRM") the Commission recognized the conflict between the development of interstate telecommunications through satellite programming and the principles of federalism. Although Comments were filed alleging a need for stability in rules to promote the industry<sup>2</sup>, the Local Communities urge the Commission to revise the proposed rule to preserve local laws relied upon by property owners, neighborhoods, and others who have made substantial investments in the community. Failure to do so, the Local Communities believe, unfairly favors the interests of the telecommunications industry at the expense of local needs.

#### **I. PURPOSE OF CODES AND NEED FOR STABILITY.**

Zoning, building, and electric codes serve important public health, safety and welfare purposes. Zoning and building codes provide minimum standards to safeguard life, limb, health and property. Setbacks and side yard requirements prevent objects from obstructing access by emergency vehicles and personnel. Visibility regulations also allow clear visibility for vehicles entering or exiting the property. Building codes set minimum standards to preserve safety by preventing injuries from falling or damaged structures. Electric codes safeguard persons and property from hazards arising from the use of electricity.

Zoning, building and electric codes must be adapted to local circumstances in order to serve these underlying purposes. For example, local topography, weather patterns, and seismic conditions may render a structure that is perfectly

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<sup>2</sup> Comments of Amoco Corporation (July 19, 1995), at 1.

safe and appropriate in one community a dangerous hazard in another community. Citizens expect local governments to adopt and enforce codes tailored to local circumstances for the protection of their lives and the enjoyment of their property. Such codes create a reliable environment for property ownership and development. Without zoning, building and electric codes, disorder and danger would rule, destroying citizen confidence in the value and safety of their property. The Commission's expertise in telecommunications gives the agency no guidance in balancing the many local considerations that influence zoning, building and electric codes.

## **II. A PRESUMPTION OF REASONABLENESS .**

The Local Communities urge the Commission to modify the proposed rule to preserve the usual and customary presumption that local codes are valid.<sup>3</sup> Overturning this presumption leads to confusion for landowners, increased costs for cities and counties, and a greater burden on the Commission. For the Commission to preempt all local codes creates a precedent for preemption by other agencies, eventually leading to destruction of local autonomy. Eliminating the presumption that local codes are valid is counterproductive to the principles of federalism.

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<sup>3</sup> NPRM at ¶67. In Texas local ordinances are presumed to be valid and enforceable. See City of Brookside Village V. Comeau, 633 SW 2d 790, 792 (Tex. 1982); Curto v. City of Harper Woods, 954 F 2d 1237, 1242 (6th Cir. 1992).

Like many states, Texas and California have created "home rule"<sup>4</sup> or "charter"<sup>5</sup> cities. All such cities are authorized to enact their own "statutes." The legislature recognized that local governments, when deciding local issues, should have the full force of state law. The Commission should realize what state governments have found, that a local government's decision should be given deference, because the local government is uniquely positioned to understand and resolve local concerns.

In placing the burden upon local governments in section 25.104, the Commission has presumed ALL codes governing the installation or location of any structure to be unreasonable, not just those specifically relating to satellite dishes. Is there a federal mandate demanding this result?<sup>6</sup> The Commission has not established that most local governments are abusing their power. There is therefore no basis in the record for requiring local governments to overcome this presumption. How many thousands of local governments has the Commission determined to be obstacles to the federal interest in protecting access to satellite communications? If unreasonable regulations are pervasive, how have the existing commercial and residential dishes become commonplace? While many of the industry filed Comments relate "unreasonable" incidents, the small number of these experiences in no way reflects the large number cities and local governments

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<sup>4</sup> Article 1175, Vernon's Annotated Texas Statutes.

<sup>5</sup> Cal. Cons., Art. XI, §5.

<sup>6</sup> Comments of the City of Plantation (July 14, 1995) at 2, ¶4.

### **III. THE COSTS OF REGULATION.**

Local Communities expend significant sums for preparation, publication and enforcement of zoning, building and safety codes. These activities are mandated by the legislature. The Commission would add to these costs the expense of establishing the validity of those regulations. Comments filed by many within the satellite industry noted that it can be costly to appeal from a city decision.<sup>7</sup> The Commission's proposed rules would now be shift these costs to local governments, i.e., the taxpayer. A city's failure to appear before the Commission would not prove the unreasonableness of a local code; it would demonstrate only the city's financial incapacity to appear before the Commission with all the requisite documents, exhibits and supporting expertise necessary to overcome the Commission's burden. This financial burden is even greater on small or rural communities.

The Commission would exacerbate the burden on local government by taking away the ability to recover costs associated with the regulatory process. Under Texas and California law, a municipality generally can recover in permit fees only those costs needed to provide the regulation. (Any excess is considered an illegal tax.) Under the Commission's proposed rule, if the fees are "substantial," they would be invalidated, even if they do no more than reimburse the local government for the actual costs of regulation. The result is that the taxpayer again subsidizes commercial interests.

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<sup>7</sup> See e.g., Comments of United States Satellite Broadcasting Company, Inc. (July 14, 1995), Comments of Midwest Star Satellite (July 13, 1995), Comments of Primestar Partners, L. P. (July 17, 1995) and others.

#### **IV. THE NEED FOR PRECISE RULES.**

Comments were filed requesting that the Commission establish clearer and more precise procedures about naming parties, pleadings and service and notice requirements.<sup>8</sup> Should the Commission decide against the presumption of the reasonableness of local codes, it should provide in the final order the opportunity for neighbors and abutting property owners to appear and be heard before the Commission. This is particularly important in the event a satellite dish owner decides to be distinctive in the operation of his antenna, such as in providing advertising on the equipment, having multiple dishes or placing the antenna so as to endanger the use of the abutting property. Since the Commission's focus is on industry matters, local citizens will have no voice in the appearance or safety of their neighborhood. If the Commission is to attempt to resolve differences between the industry and the locality's citizens, all interested parties should participate. This may result in the Commission becoming a "national zoning board," but it is only way to guarantee that all interests receive adequate consideration from the Commission.

#### **CONCLUSION**

Local governments constantly balance the need for development and the needs of new industries against the need for safety, planning and stability for all of its citizens. This is reflected in a city's codes and its governing body's decisions, which should be respected before the Commission. Without the Commission's availability to all interested parties, the Commission's decisions will

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<sup>8</sup> Comments of Duncan, Weinberg, Miller & Pembroke, P.C. (July 14, 1995) at 13, ¶127.

be unfairly balanced against local interests. Zoning, building and safety codes are all subject to review under the Commission's proposed rule, but they are all at the fundamental core local autonomy and authority. Federal rules impacting this authority should be limited in scope and finely drawn to preserve the validity of the local government's land use and safety codes.

Respectfully submitted,

  
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on behalf of the Local Communities